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JOHN P. BANKSON, JR.
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November 10, 1993

BY HAND

Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

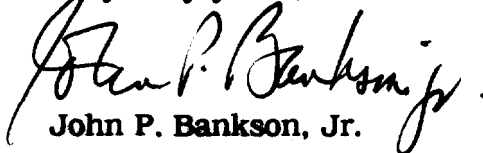
Re: PP Docket No. 93-253, Comments of Andrea L. Johnson

Dear Mr. Caton:

On behalf of Andrea L. Johnson, Professor of Law at the California-Western School of Law, we are filing, pursuant to 47 C.F.R. § 1.415 and 1.419, ten (10) copies of comments in the above-captioned rulemaking proceeding.

This filing was received today by facsimile transmission. The signed original will be filed as soon as it is received.

Very truly yours,


John P. Bankson, Jr.

JPB/lp
Enclosures

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of

Implementation of Section 309 (j)
of the Communications Act
Competitive Bidding

PP Docket No 93-253

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULE MAKING

This statement addresses the use of spectrum auctions for Interactive Video Data Service (IVDS) as well as addresses incentives for participation and opportunities for small business, minorities, women and rural telephone companies in emerging technologies such as Personal Communication Service (PCS). I concur with Commissioner Andrew Barrett's concerns regarding the set aside in the 10 MHz and 20 MHz range and the need to provide incentives to include small businesses as part of group or consortia bidding on licenses.¹ Moreover, I endorse the Small Business Advisory Report on its recommendations regarding use of the tax certificate.²

There are four additional points to be made. First, spectrum auctions should not be used for IVDS without consideration of Title

¹ "Dissenting Statement of Commissioner Andrew C. Barrett--In re: Amendment of the Commission's Rules to Establish New personal Communications Services (Second Report and Order) ("Barrett Dissenting Statement"), Report No. DC-2503, Gen Docket No. 90-314 (September 23, 1993)

² Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen Docket 90-314, (hereinafter "SBAC Report", 17-30 (September 15, 1993).

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III requirements which apply to all media of mass communications.¹ Second, should spectrum auctions be used for licensing of all new technology, some qualitative enhancement should be included as part of the initial bidding for consortia which include small businesses, minorities, women, and rural telephone companies. Third, it is critical that equal employment opportunity requirements be imposed on all licensees of new technologies under an auction process regardless of the technology or service provided. Finally, some of the proceeds from auction revenues should be contributed to a Communication Capital Fund, to be used as investment capital or to fund research and development. Each point will be discussed below.

1. Spectrum Auctions for IVDS

The Commission has tentatively concluded that competitive bidding should begin for PCS, and some services regulated by the Private Radio and Common Carrier Bureaus such as IVDS.² The FCC also proposes to exclude from spectrum auctions most mass media services.³ There are certain IVDS services, however, which would include mass media services such as distant learning or other

¹"Media of Mass Communications" includes "television, radio, cable television, multipoint distribution service, direct broadcast satellite service and other services, the licensed facilities of which may be substantially devoted toward providing programming for other information services within the editorial control of the licensee." 47 U.S.C. 309(1)(3)(C)(1)(1988).

²"Proposed Rules Re: Implementation of Section 309(j) of the Communications Act-Competitive Bidding", 58 FR 53489, par. 2 (October 15, 1993)

³ Id. at par. 1.

educational programming.

Presumably, the reason for treating PCS and IVDS the same is that they both will make their services available on a subscriber-based.¹ IVDS is similar to Instructional Television Fixed Services (ITFS) in the type of services that can be provided. The Commission, in trying to implement a lottery system to license excess channel capacity for ITFS, was faced with similar issues. The D.C. Circuit in Telecommunications Research & Action Center v. FCC, 836 F.2d 1349, 1361 (D.C. Cir. 1998) held that the FCC lacked the authority to use a lottery system without employing statutory media diversity and minority ownership preferences. The FCC should not, in its deliberations of spectrum auctions for IVDS, ignore Title III requirements.

It is important to note that the proceedings during which subscriber-based technology was reclassified or redefined to be exempt from Title III requirements were conducted on an ad hoc basis² relating to technology no longer being used.³ There has not been comprehensive discussion of creating a uniform regulatory structure which addresses licensing based upon sometimes competing

¹ Under current definitions, IVDS is not included in the definition of "broadcasting" or "cable system". In re Subscription Video, ("In re STV"), 2 F.C.C.R. 1001, 1006 (1987); National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, (D.C.Cir. 1988).

² Andrea L. Johnson, "Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications," 26 U.C. Davis 87, 132-141 (1992).

³ At the time of the STV Proceeding, there were only one or two STV stations still in operation. In re Subscription Video, 2 FCCR 1001, 1006, 1009 n.26 (1987)

goals governing common carriers and media of mass communications. The Commission needs to formulate a policy related to licensing technology which can be used for voice, data and video, and reconcile the goals to promote diversity and prevent undue concentration on the one hand, and provide universal access at an affordable cost on the other. At issue are basic diversity requirements such as Equal Employment Opportunity requirements, tax certificates, and other enhancements to encourage small business and minority participation.

Congress, in its wisdom, has mandated that special protections be included in auction licensing to address small business concerns.² In an attempt to meet time constraints and allow new technology to reach the marketplace, the Commission should not simply treat new technology such as PCS and IVDS the same without first considering the ramifications on First Amendment principles and the mandates of the Communication Act of 1934. It is important that certain Title III requirements be extended to all new technology to protect small business, minorities and women based on a deliberate and thoughtful rationale. Accordingly, it is requested that the Commission consider use of spectrum auctions for IVDS in a separate rulemaking proceeding.

2. Spectrum Auction Process and Qualitative Factors

Spectrum auctions should be used in conjunction with some combination of lotteries and incentives. Under this proposal,

²Budget Reconciliation Act of 1993, P.L. 103-66, Title VI, 107 Stat. 312 (August 10, 1993).

interested parties would submit sealed bids for a license." If there is only one highest bidder then that applicant would get the license upon payment of the bid amount, if the bidder is otherwise qualified. If there are two or more applicants filing highest bids, then a lottery would be used to choose the winner, again assuming the applicant is otherwise qualified. Losers could appeal to the courts. If the case is remanded to the FCC, the auction and/or lottery would be repeated.

The FCC should incorporate qualitative factors into the first stage of the licensing process where auctions are used. If qualitative factors are considered and evaluated as part of the process before bids are accepted, then it is more likely that small business and minority protections can be effectively implemented. Incentives or enhancement credits ranging between 10-25 percent" of the total bid could be given to consortia for MTA and STA licensees which incorporate small business concerns." This can be a voluntary program which would allow some combination of

" "To Avoid 'Name Calling'; Auction-Lottery Proposed as Substitute for Comparative Hearings," 12 Communications Daily 4 (May 22, 1993)

" Credits could be based on multiples of expenditures for research and development on spectrum efficiency incurred by the applicant; the projected value of the bidder's commercial activities to the community of license; or the value of public services the bidder proposes to offer. "Public service" could include, for example, provision of on-the-job training or work-study relationships with local educational institutions. SRAC Report, supra, note 2 at 15.

" Id. at 14-15.

credits and installments."

The qualitative assessment could focus on small business initiatives proposed by the applicant. Applicants could submit a Small Business Initiative Plan, which would include 1) how the applicant intended to incorporate small businesses and minorities into the construction, operation, and management of the system; 2) targets for contracting with small business, minority and/or women equipment and service vendors; 3) the percentage of minority representation to be hired which can reflect the work force in the community; and/or 4) a list of proposed businesses or resource organizations which will be used to achieve the plan's goals.

FCC staff could evaluate each proposal as part of the initial screening of the application and award a value-added credit or enhancement that could be factored into the bid. This assessment could be evaluated through quantitative data, e.g., number of minorities or women employed, number of dollar amount of small or disadvantaged businesses contracted to provide goods and services, target dates and assurances. If the plan goals are not substantially met by the end of the license period, the applicant could get a demerit against the renewal expectancy.

In the event of a tie, the FCC could use a lottery system to award the license. Any challenges would be made to the U.S. Court of Appeals for the District of Columbia.

This proposal is attractive because it puts the burden on the applicant to design a small business program that addresses issues

" Id

in the given market while considering the applicant's financial constraints. Moreover, it allows aspiring entrepreneurs to get the training and business opportunities necessary to develop innovations in technology and more efficient use of the spectrum and compete in the marketplace. Administratively, it is not unduly burdensome because it takes less time than a comparative hearing, and curtails potential scams often found with lotteries. Most importantly, it satisfies the public interest mandate of the Communications Act to make the best practicable service available to as many people, and prevent undue concentration of ownership."

3. Equal Employment Opportunities

It is unquestioned that one key factor in getting financing and in participating in new technology opportunities is developing the skills necessary to compete. The priority given to education in computer science, math, and engineering bears witness to the importance of basic skills training. In emerging technology areas, much of this training will be provided on the job, not in the classroom. Access to entry, mid-level management, and top management positions is therefore critical to an awareness and understanding of the market variables that account for success or failure in the industry. It is also critical that prospective employees have interdisciplinary skills which allow them to remain flexible as the market for new services starts to settle.

The FCC has a long standing policy to prohibit discrimination in the work force and has evidenced its commitment to effectively

" See generally 47 U.S.C. 151.

enforce its EEO requirements." However, minority representation in telecommunications is grossly disproportionate. In a 1991 study of "Minority Business Enterprises", the total number of telecommunications firms in the United States was only 490 or .5 percent of all telecommunication firms." Clearly, there is a need to reinforce this policy by including compliance with EEO requirements, similar to what is required of cable companies and other media of mass communications.

The argument that the new proposed services will be provided on a subscriber basis and will be non-broadcast services is irrelevant. There is no dispute that the broadcasting, common carrier, and the cable industries are converging and that previous distinctions are outdated as everyone is providing the other's services, *i.e.*, voice, data, and video." The opportunities for access to these industries should be color blind. Unfortunately, I fear that if the FCC does not mandate nondiscrimination and stress its importance as a policy for new and emerging technologies, the modest gains made over the years will quickly diminish.

4. Communications Capital Fund

¹² See Andrea L. Johnson, *supra* note at 143-147 (1992)

¹³ "Minority" is defined to include African-Americans, Hispanics, Native American, Asian Indian, and Hasidic Jews. Minority Business Development Agency, U.S. Department of Commerce, "Market Analysis of the Telecommunications Industry-Vol. 2 " p. 18 (1991).

¹⁴ *Id.*

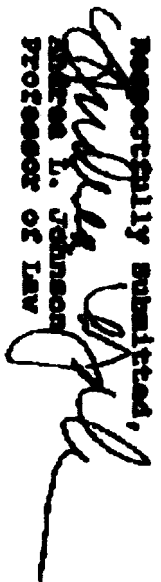
¹⁵ Andrea L. Johnson, *supra* note 6 at 89.

Up to ten percent of the revenue generated from auctions should be contributed toward a Communications Capital Fund. The Fund would be used for telecommunications training, research and development grants, and/or financial assistance for small and minority businesses."

This proposal is attractive because it gives most of the revenue to the government to offset the deficit while allowing telecommunications dollars to be reinvested in the industry. Moreover, it allows spectrum auctions to benefit small business, particularly if entry requirements are reasonable.

Finally, creation of a fund spreads out the burden of support for innovation and development across the telecommunications industry. Innovations will no longer be solely dependent upon subsidies through research grants from the National Science Foundation and National Telecommunication Information Agency.

Thank you for your consideration. I commend the Commission on the task it has undertaken and have every confidence that a uniform, comprehensive regulatory framework can be implemented to address the issues raised above. I remain committed to providing whatever technical support necessary to assist in a thoughtful deliberation of these issues.

Respectfully Submitted,

Robert L. Johnson
Professor of Law